

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 6573

Petition to impose penalties upon Don Weston	)	
Excavating, Inc. re: probable Dig Safe violation	)	Hearing at
involving a Vermont Gas Systems, Inc. utility line	)	Montpelier, Vermont
located in Williston, Vermont	)	November 5, 2001

Order entered: 6/24/2002

PRESENT: Judith M. Kasper, Esq., Hearing Officer

APPEARANCES: John Cotter, Esq.  
For Vermont Department of Public Service

Don Weston, President  
Don Weston Excavating, Inc.

Suzanne Monte, Esq.  
Downs Rachlin & Martin, PLLC  
For Vermont Gas Systems, Inc.

**I. INTRODUCTION**

This case arises in connection with Vermont's underground utility damage prevention system ("Dig Safe"),<sup>1</sup> which contemplates that a utility company will be given advance notice of excavation proposed in the vicinity of its underground facilities, so that the company will mark the location of those underground facilities, and the excavator will take precautions to avoid damage to them.<sup>2</sup>

On August 24, 2001, the Vermont Department of Public Service ("Department") filed a Notice of Probable Violation under Public Service Board ("Board") Rule 3.807(A), alleging that

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1. 30 V.S.A. Sections 7001 through 7008 and Public Service Board Rule 3.800.

2. 30 V.S.A. Sections 7004, 7005, 7006 and 7006b.

Don Weston Excavating, Inc. ("DWE") had failed to use reasonable precautions as required by 30 V.S.A. Section 7006b, and had thereby caused damage to a Vermont Gas Systems, Inc. ("VGS") service line. The Department has requested that the Board find DWE in violation of 30 V.S.A. Section 7006b, and impose a fine of two hundred dollars (\$200).

On August 28, 2001, DWE filed an objection to the Notice of Probable Violation and requested a hearing before the Board.

On November 5, 2001, a technical hearing in connection with the Notice of Probable Violation was held at the Board hearing room in Montpelier, Vermont. The Department, DWE and VGS all were in attendance.

Based on the record and evidence in this docket, I report the following to the Board, pursuant to 30 V.S.A. § 8.

## **II. FINDINGS**

1. On June 6, 2001, DWE was preparing to excavate a portion of road located at the intersection of Routes 2 and 2A in Williston, Vermont (Taft Corners). Exh. DPS-4.
2. VGS transmission and service lines are located in that same area of road. Exh. DPS-3.
3. Prior to DWE beginning its excavation at Taft Corners, Dig Safe was called, and a VGS line was marked. Exh. DPS-4.
4. DWE initiated its excavation by hand digging in the area where it believed the VGS line was located. Exh. DPS-4; testimony of Donald Weston, tr. 11/5/01, pp. 29, 30, 34.
5. In the course of its excavation by hand digging, DWE observed a portion of a VGS transmission line, a valve box, and a portion of a VGS service line that ran off of the transmission line. At the location of the transmission/service line intersection, both lines lay flat and were buried at a depth of 30 to 36 inches. Testimony of Donald Weston, tr. 11/5/01 pp. 27-30, 38.
6. After the above portions of VGS lines were observed by DWE, machine excavation was undertaken, with Mr. Donald Weston operating a 315 Cat excavator. This machine excavation took place within the state right of way. Testimony of Donald Weston, tr. 11/5/01 pp. 24-25, 61-62, 64.

7. The above-described VGS service line was broken when the bucket of the Cat excavator operated by Mr. Weston caught the corner of that line. The bucket of the 315 Cat excavator had gone down about six inches when the corner of the bucket hit the VGS service line. Testimony of Donald Weston, tr. 11/5/01, pp. 31, 34-35.

8. The depth at which the VGS service line was buried rose from thirty inches to six inches over a distance of between four and four and one-half feet. Testimony of Donald Weston, tr. 11/5/01, p. 33.

### **III. DISCUSSION**

The Department has alleged that DWE failed to use reasonable precautions while excavating near the intersection of Routes 2 and 2A in Williston, Vermont (Taft Corners), and thereby caused damage to a VGS service line. The Department has claimed that VGS properly marked the service line, and that DWE should have been excavating by hand-digging, rather than by machine, at the time that the line damage was sustained.

DWE has acknowledged that it damaged a VGS service line. However, DWE maintains that such damage was not a consequence of DWE's failure to excavate properly under the circumstances. Specifically, DWE asserts that the damaged line itself was not marked prior to the time of excavation, and that it was not improper for DWE to be excavating by machine at the time that the damage was sustained.

30 V.S.A. Section 7006b provides:

Any person engaged in excavating activities in the approximate location of underground utility facilities marked pursuant to section 7006<sup>3</sup> of this title shall take reasonable precautions to avoid damage to underground utility facilities, including but not limited to any substantial weakening of the structural or lateral support of such facilities or penetration, severance or destruction of such facilities . . . .

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3. 30 V.S.A. Section 7006 provides, in pertinent part: "A company notified in accordance with section 7005 of this title shall, within 48 hours, exclusive of Saturdays, Sundays and legal holidays, of the receipt of the notice, mark the approximate location of its underground utility facilities in the area of the proposed excavation activities . . . ."

Thus, the standard which the excavator must meet is clear -- (s)he must take "reasonable precautions" to avoid damage to a utility company's underground facilities. For the reasons set forth below, I am not persuaded that DWE failed to meet this statutory obligation.

The testimony of Donald Weston offers a first-hand account of the incident at issue. He testified that at the time of the incident, DWE was in the process of widening Williston Road. He stated that, in the course of DWE hand digging in the vicinity of a marked VGS transmission line located in the shoulder of the road, he observed a valve box and a portion of a service line that ran off of the transmission line.<sup>4</sup> Mr. Weston testified that the service line was not marked at that time, and that at the location of the transmission/service line intersection, both lines lay flat and were buried at a depth of 30 to 36 inches.<sup>5</sup> He explained that there were several large boulders in the vicinity of the transmission/service line intersection, that machine digging was undertaken to remove these boulders "off the top," and that hand digging was to be done when they got closer to the actual depth of the line.<sup>6</sup> Mr. Weston stated that he operated the machine, a 315 Cat excavator, using a bucket that had a square bar across it rather than teeth, "so we can dig a little bit smoother and so we won't tear the lines up."<sup>7</sup> He also testified that the machine digging took place within the town right-of-way, where, on past occasions, the gas company had advised him that the lines would be buried at a depth of approximately 30 inches.<sup>8</sup> He further stated that the machine bucket had gone down about six inches when the corner of the bucket hit the VGS service line.<sup>9</sup> He estimated a distance of between four and four and one-half feet between the point at which the service line was buried 30 inches and the point at which the line was hit.<sup>10</sup> Mr. Weston stated that he had been an excavator his entire life, and that this was the first time that he had encountered a service line that rose at such a sharp incline.<sup>11</sup>

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4. Tr. 11/5/01, pp. 28-30.

5. Tr. 11/5/01, p. 27.

6. Tr. 11/5/01, pp. 31-32, 39-40.

7. Tr. 11/5/01, pp. 23-24, 30.

8. Tr. 11/5/01, pp. 61-62, 64.

9. Tr. 11/5/01, p. 31.

10. Tr. 11/5/01, p. 33.

11. Tr. 11/5/01, pp. 23 and 32.

In support of its assertion that DWE did not take reasonable precautions as required by the Vermont Dig Safe statute, the Department argued that DWE should have been hand digging rather than machine digging at the time that the service line was hit. The Department contended that at the time of the incident the service line was marked, and that Dig Safe, Inc., recommends hand digging in a marked area. However, I am not persuaded by the testimony and other evidence in the record of this docket that the VGS service line was marked prior to DWE's excavation.

Donald Weston testified that the VGS service line was not marked prior to DWE's excavation, but that after the service line was hit by DWE's machine bucket, someone came through and marked it.<sup>12</sup> The Department did not present any witnesses who, on the basis of their own personal knowledge, testified to the contrary. Rather, the Department presented a VGS gas service map<sup>13</sup> along with a print-out from VGS's Dig Safe computer file with handwritten notes.<sup>14</sup> These documents, read together, purported to demonstrate that the service line had been marked prior to DWE's excavation. However, the individual who prepared the handwritten notes did not testify in this proceeding. Instead, Mr. Steven Miner, operations manager at VGS, testified concerning the documents.<sup>15</sup> Mr. Miner could not state with certainty that the handwritten notes on the computer print-out related with specificity to the VGS service line that was damaged by DWE.<sup>16</sup> Also, Mr. Miner testified that he inspected the damage shortly after it occurred. Although he stated that the service line was clearly marked at that time, he acknowledged that the VGS crew had arrived at the damage site prior to his arrival there, and that it was possible that they had marked the line after the damage occurred but before he arrived.<sup>17</sup> In considering all the evidence offered on this point, I regard Mr. Weston's testimony as being the most persuasive. Consequently, in determining whether DWE failed to take "reasonable

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12. Tr. 11/5/01, pp. 28-30.

13. Exh. DPS-3.

14. Exh. DPS-5.

15. Tr. 11/5/01, pp. 43-51.

16. Tr. 11/5/01, pp. 49, 54 and 55.

17. Tr. 11/5/01, pp. 50-51.

precautions," I will not rely upon the premise that the damaged VGS service line was marked at the location of the damage prior to DWE's excavation.<sup>18</sup>

This leaves the question of whether DWE took reasonable precautions to avoid damage to the VGS service line notwithstanding whether that line was marked. The Department suggested that once DWE became aware of the existence of the service line, but not the line's exact location, DWE should have refrained from machine digging.<sup>19</sup> The Department also contended that machine digging in the area constituted a failure to take reasonable precautions because buried lines can change depth – shift position due to changes in their environment – so even though a line originally may have been buried eighteen inches deep, there is no way to know whether that line may still rest at such depth.<sup>20</sup> For the reasons set forth below, I do not agree with the Department's position that, in this case, DWE's machine digging constituted a failure to take reasonable precautions as required by 30 V.S.A. Section 7006b.

Kevin O'Donoghue, the Department's Dig Safe investigator, testified that the proper installation depth for a service line buried in a public right-of-way is eighteen inches.<sup>21</sup> Mr. Weston stated that, at the point that the VGS service line joined the VGS transmission line, it was in the public right-of-way, buried at a depth of thirty inches. He also explained that, customarily, a service line rises from the transmission line depth at a *gradual* angle. Mr. Weston testified that, instead of rising gradually, the subject VGS service line rose sharply to a depth "less than 18 inches . . . [i]t was close, more like six inches."<sup>22</sup> He estimated a distance of four to four and one-half feet between the point at which the service line was buried 30 inches and the point at which the line was buried less than twelve inches. He also stated that he grew up in the excavating business, that he had been an excavator all his life, and that this was the first time that he had encountered a service line that rose at such a sharp incline.<sup>23</sup>

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18. Because I decline to find that the VGS service line was marked prior to the excavation, I need not reach the question of whether the asserted Dig Safe, Inc., recommended practice about hand digging in marked areas is dispositive of whether DWE took reasonable precautions to avoid damage to the VGS service line.

19. Tr. 11/5/01, p. 39.

20. Tr. 11/5/01, pp. 18-19.

21. Tr. 11/5/01, p. 18; *see*, 49 C.F.R. Section 192.361.

22. Tr. 11/5/01, p. 31.

23. Tr. 11/5/01, pp. 23, 31-32.

Mr. Weston also testified that, at different points along its length, the transmission line was buried at depths varying between 30 and 36 inches.<sup>24</sup> Therefore, even if the service line originally had been buried at a depth of at least 18 inches, and then had shifted within a six-inch range over time (similar to the 30 to 36 inch variation in the transmission line depth), it might be reasonable for Mr. Weston to expect the service line to be buried at a depth of 12 inches at some point(s) along its length. Mr. Weston testified that he was machine digging a little bit at a time to a depth of roughly 12 inches, and that the service line was hit on the very first pass.<sup>25</sup> He testified that the service line was buried at a depth of six inches at the point at which it was hit. This testimony was uncontroverted. Under these circumstances, I do not conclude that Mr. Weston failed to take reasonable precautions by machine digging to a depth of six inches.

#### **IV. CONCLUSION AND RECOMMENDATION**

While the purpose of the Dig Safe statute and regulations is to avoid the type of damage sustained in this case, and while there is question as to whether damage here might have been avoided had DWE been hand-digging rather than machine digging at the location in question,<sup>26</sup> the standard that triggers penalties under 30 V.S.A. Section 7006b is an excavator's failure to take "reasonable precautions" to avoid causing damage. For the reasons discussed above, I conclude that DWE did not violate 30 V.S.A. Section 7006b. Accordingly, I recommend that the Board deny the Department's request to impose a \$200 fine in this case.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 19<sup>th</sup> day of June, 2002.

s/Judith M. Kasper  
Judith M. Kasper  
Hearing Officer

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24. Tr. 11/5/01, p. 27.

25. Tr. 11/5/01, pp. 33 and 59.

26. There also is question as to whether VGS had clearly marked the full length of the service line before excavation began.

**V. ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions, and recommendation of the Hearing Officer are hereby adopted.
2. The request of the Department of Public Service for imposition of a Two Hundred Dollar fine against Don Weston Excavating, Inc., is denied.
3. This docket shall be closed.

Dated at Montpelier, Vermont, this 24<sup>th</sup> day of June, 2002.

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	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/John D. Burke	)	

OFFICE OF THE CLERK

FILED: June 24, 2002

ATTEST: s/Susan M. Hudson

Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*